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## Cross-border Civil Litigation in the EU: What Can We Learn From COVID-19 Emergency National e-Justice Experiences?

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### Abstract

Free movement of people, goods, services, and capital in Europe requires well-functioning cross-border dispute resolution mechanisms. Many initiatives have been taken over time by the EU institutions and Member States, both introducing legal instruments and developing information and e-justice technologies to support cross-border judicial litigation and cooperation. Unfortunately, the results so far achieved do not seem to be adequate to the needs of our increasingly inter-connected society. Adding to this, the first wave of COVID-19 emergency measures brought court-based dispute resolution to a grinding halt. All around Europe, court buildings have been closed to the public, hearings suspended, and only emergency cases carried out. Some hope though seems to come from this bleak moment. The breakdown of existing practices, and the need to ensure the justice service provision required for our societies' functioning, resulted in many local and national initiatives to reconfigure the justice service. It provided the occasion to experiment with remote justice service provision and explore possibilities to reconfigure technologies and tools, which in many cases had been available for years, to permit remote working, hearings and legal communication. While most of the experiences have been carried out within the national boundaries, they provide the occasion for rethinking cross-border judicial procedures outside their traditional schemas. Building on this, taking stock of pre-COVID-19 EU cross border judicial services situation, this paper explores EU Member States e-justice emergency measures and attempts to stimulate the discussion on their potential for innovation in cross border judicial proceedings.

**Keywords:** Justice; COVID-19; cross-border judicial procedures; Judicial cooperation; e-justice; e-CODEX



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## 1. Introduction<sup>1</sup>

As COVID-19 second wave spreads around Europe, forcing the EU Member States to deploy restrictive measures to limit its diffusion and protect the people's health and well-being, reflection on the first wave emergency measures and experiences allows us to face the current situation better, but also plan for the future.

The breakdown during the emergency of common practices characterizing how we organize our everyday life has, in many instances, led to the reconsideration of existing routines in light of their limits in the current situation. This process has allowed reviewing the well-established patterns which inevitably drive our choices,<sup>2</sup> reconsidering available resources, exploring possible alternative uses, and experimenting outside the limits imposed by long-standing traditions and rules. It has allowed exploring in particular, the opportunities provided by new technologies that could not be grasped due to shared pre-existing understandings of how things should be done. This is because *"our practices are mediated by a web of objects, tools and representations"*,<sup>3</sup> and while the introduction of new technologies and tools may result in changes in long-established practices as *"features and functionalities are specifically associated to the medium in which they are embedded"*,<sup>4</sup> existing representations, rules, and ways of doing things tend to remain, shaping the new objects' space of action.

From this perspective, the COVID-19 emergency, with its disruptive impact but also its prolongation over time, generated a space where usual practices and rules – based on physical presence and exchanges – had to be suspended, and new modes of action had to be established if activities were to be carried out. In a way, the characteristics of the emergency allowed a shift in the *"attitude taken by persons toward the beliefs, values, knowledge, information, abilities, and skills that are held, a tendency to doubt that these are necessarily true or valid and to doubt that they are an exhaustive set of those things that could be known"*.<sup>5</sup> In other terms, the need to overcome the limits of the existing practices (and related expectations on how things should be done, rules and behaviors) brought about by the pandemic emergency provided an opening for the experimentation of new modalities of actions, based on repurposing, reconfiguration, and adaptation of available technologies and tools.

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<sup>1</sup> This paper has been drafted with the financial support of the Justice Programme of the European Union "Me-CODEX II: Maintenance of e-Justice Communication via Online Data Exchange", JUST/CEF-TC-2018-CSP-ECODEX. The contents of this paper are the sole responsibility of the author, and can in no way be taken to reflect the views of the European Commission.

<sup>2</sup> Weick, K. E. (1993). The collapse of sensemaking in organizations: The Mann Gulch disaster. *Administrative science quarterly*, 628-652, p.642

<sup>3</sup> Lanzara, G. F. (2015). How Technology Remediates Practice: Objects, Rules, and New Media. In *Materiality, Rules and Regulation* (pp. 195-220). Palgrave Macmillan, London. p.196

<sup>4</sup> Lanzara, G. F. (2015). How Technology Remediates Practice: Objects, Rules, and New Media. In *Materiality, Rules and Regulation* (pp. 195-220). Palgrave Macmillan, London. p.196

<sup>5</sup> Weick, K. E. (1993). The collapse of sensemaking in organizations: The Mann Gulch disaster. *Administrative science quarterly*, 628-652, p.641

Court-based dispute resolution has been one of the areas affected by the pandemic. While information and communication technologies have been introduced in the courts to support interactions between court and court-users in the last 30 years, remote forms of litigation, especially in relation to the hearings, have still been the exception before the current emergency.<sup>6</sup>

When physical courts have been closed due to the emergency measures, and court activities limited to exceptional cases, this has shaken one of the pillars of the social and economic life of our society, which is based on access to justice and the rule of law, prompting the search of alternatives ways for the provision of court justice services. Consequently, European judiciaries have been struggling to cope with the COVID19 emergency, devising mechanisms to carry out basic court activities and services and recover from the effects of the *"measures taken in an EU Member State in order to counter the spread of COVID-19"*.<sup>7</sup>

While the focus of ensuring justice service provision during the emergency has been often on the national level, cross-border movement of goods such as food, medical supplies, and other essential goods and services, especially in critical sectors such as health care, also need to be supported by a functioning justice system. Access to justice and the rule of law are critical components of modern societies. Even before the COVID-19 emergency, justice systems and judicial procedures worldwide were already under increasing strain due to several factors such as increased mobility of people across national borders and new forms of trans-national e-business and e-commerce. Within the European Union, the common sources of strain added up to the justice requirements relating to the free movement of people, goods, services, and capital.<sup>8</sup> More recently,

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<sup>6</sup> See for example:

Contini, F., & Fabri, M. (eds.). (2003). Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends, Lo scarabeo;

Velicogna, M. (2007). Justice systems and ICT-What can be learned from Europe. Utrecht L. Rev., 3, 129

Cerrillo, A., & Fabra, P. (eds.). (2008). E-Justice: Using Information Communication Technologies in the Court System. Information Science Reference-Imprint of: IGI Publishing.

Contini, F., & Lanzara, G. (eds.). (2009). ICT and innovation in the public sector: European studies in the making of e-government. Palgrave Macmillan, London.

Contini, F., & Lanzara, G. F. (eds.). (2014). The circulation of agency in e-justice. Interoperability and Infrastructures for European.

CEPEJ-CoE (2020) European judicial systems - CEPEJ Evaluation Report - Evaluation cycle 2020. Part 1: Tables, graphs and analysis. Council of Europe.

<sup>7</sup> [https://e-justice.europa.eu/content\\_impact\\_of\\_the\\_covid19\\_virus\\_on\\_the\\_justice\\_field-37147-en.do](https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do)

<sup>8</sup> The establishment of the four fundamental freedoms of the EU has been the result of a long process, starting with the 1957 European Economic Community Treaty in 1957. For a discussion on the four freedoms, see, for example, Oliver, P., & Roth, W. H. (2004). Internal Market and the Four Freedoms, The. Common Market L. Rev., 41, 407.

the free flow of non-personal data<sup>9</sup> and the free movement of judgments<sup>10</sup> are being added to the four more traditional freedoms. Just to give an example of the impact of these freedoms, in 2015, marriages involving at least one foreigner accounted for 10.5% of all marriages in the EU.<sup>11</sup>

In the effort to cope with the challenge generated by the increasing need to access justice in cross-border situations, EU institutions deployed several legal instruments. While from a legal perspective, *"[t]here is no doubt that these instruments have built a genuine Judicial Area where citizens and businesses can rely on operating justice systems and functioning cross-border cooperation"*,<sup>12</sup> especially in the civil justice area, the results achieved from a practical perspective have been much more limited.<sup>13</sup>

Over time, various initiatives have been taken to improve the situation through the use of technology. A European e-Justice Portal has been set up to provide information about the EU legislation and the EU Member States' justice systems to improve access to justice throughout the EU. Furthermore, a European e-Justice Digital Service Infrastructure (e-CODEX) has been developed to interlink existing national and European ICT systems in the e-Justice domain and allow the exchange of case-related data in cross-border legal procedures. As is emerging from this platform's piloting, the cross-border judicial procedures' usability has not significantly improved, and national procedural specificities and practices continue to pose serious problems.

In other words, while much progress has been made, the attempt to tackle the issue of cross-border litigation, even with the support of new technologies and tools, has not achieved the objective of ensuring easy access to justice. The cage provided by long-established national practices and local understanding on how things should be done seems to have played a significant role in limiting the possibilities of standardization supported by EU procedures and the potentials for reconfiguration enabled by new technologies.<sup>14</sup>

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<sup>9</sup> See: Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (Text with EEA relevance.) PE/53/2018/REV/1

<sup>10</sup> See for example Hazelhorst, M. (2017). Free movement of civil judgments in the European Union and the right to a fair trial. Springer.

<sup>11</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=People in the EU - statistics on origin of residents&oldid=390413](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=People_in_the_EU_-_statistics_on_origin_of_residents&oldid=390413)

<sup>12</sup> Hess, B., & Kramer, X. E. (2017). From common rules to best practices in European Civil Procedure: An Introduction. In Hess, B., & Kramer, X. E. (Eds.) From common rules to best practices in European Civil Procedure (Vol. 8). Nomos Verlag. P.9

<sup>13</sup> See, for example:

von Hein J. and T. Kruger (eds.) (2021), Informed Choices in Cross-Border Enforcement. Cambridge, Intersentia. Onțanu, E. A. (2017). Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures, Intersentia.

<sup>14</sup> Velicogna, M. (2017). In search of smartness: The EU e-Justice challenge. In Informatics (Vol. 4, No. 4, p. 38). Multidisciplinary Digital Publishing Institute.

In this context, the experiences carried out in the EU national systems during the emergency in fields such as remote justice service provision and reconfiguration of available tools in order to permit the use of previously not allowed functionalities may set the ground for rethinking cross-border procedures in light of the novelties introduced. Building on this, the paper first describes the EU cross-border judicial services pre-pandemic situation. This description is based on data collected over the last ten years through several EU projects' research activities aimed at improving the understanding of EU cross-border judicial procedures and supporting their digitization (BIECPO; e-CODEX; e-SENS; API4Justice; Pro-CODEX; Me-CODEX). This long-term effort has allowed collecting qualitative and quantitative data through multiple methodologies, including questionnaires, interviews, direct observation, and in some instances, ethnographic. A dialogic approach with users (specialized lawyers, judges, and court administrative personnel), Member States competent Authorities representatives (many EU Ministries of Justice have been involved in several of the projects), and the academy (presentations in ad-hoc workshops but also in several international conferences) has been used to validate the findings.

The paper then explores EU Member States e-justice COVID-19 emergency measures building on the data collected by the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ-CoE) on National judiciaries' COVID-19 emergency measures of COE member States through the members of its network,<sup>15</sup> extended with data collected through desk research and informal discussions with practitioners and experts on legal, organizational, and technological initiatives. The objective is to stimulate the discussion on the potential value of these experiences and experimentations for the innovation of cross-border judicial proceedings.

## 2. Solving cross-border disputes and access to justice

Access to effective judicial remedies is an essential requirement for the functioning of society. It requires *"an effective possibility for the parties to bring an action before the court in a particular case in terms of procedural requirements, timeframe, and costs, without being hindered unreasonably by practical impediments"*.<sup>16</sup> At the same time, guaranteeing effective access to justice may not be easy as several factors may weaken it. These factors include prohibitive costs of

<sup>15</sup> <https://www.coe.int/en/web/cepej/national-judiciaries-covid-19-emergency-measures-of-coe-member-states>

<sup>16</sup> Onțanu, E. A. (2020). Encoding Justice: A Quest for Facilitating Access to Justice by e-Handling of Cross-Border Litigation. The Example of the European Uniform Procedures. In The 50th Anniversary of the European Law of Civil Procedure (pp. 473-506). Nomos Verlagsgesellschaft mbH & Co. KG.

See also E.A. Onțanu, E. Pannebakker, 'Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach', *Erasmus Law Review*, (2012)3, p. 173

judicial action, lack of available and affordable legal representation, limitations in existing remedies provided by law or in practice, lack of adequate information about the existence of specific legal procedures and how to carry them out, avoidance due to high costs, or a sense of purpose's futility.<sup>17</sup> These factors are even more critical in transnational litigation, as justice systems are primarily designed to deal with national cases. A particularly sensitive area is the service of documents across the national border. As countries have different approaches to it, following national procedures when the defendant resides or is based in a different country may result in the judgment's non-enforceability. Furthermore, in a cross-border claim, the parties often have to litigate in a foreign language. *"This does not only increase the costs, duration and complexity of cross-border litigation due to the required translations, but also challenge the right to a fair and speedy trial where proper translations are lacking or where language obstacles are frustrating proceedings."*<sup>18</sup>

At the same time, changes in the social and economic ecosystem of the EU resulting from the increasing movement of people, capital goods, and services require national systems to overcome the traditional limits that disputes among individuals or businesses which reside or are based in different countries (i.e. transnational litigation) pose.<sup>19</sup> To overcome such limits, the European Union operated through a series of successive steps. International conventions such as the Hague Convention on the service of documents initially governed EU judicial cooperation in civil matters. With time, judicial cooperation in civil matters was first *"included in the Maastricht Treaty as a 'matter of common interest', and subsequently in the Treaty of Amsterdam (1997), which places judicial cooperation in civil matters at Community level by associating it with the free movement of persons"*.<sup>20</sup> At present, based on the Treaty on the Functioning of the European Union, the EU legislator is charged with the task of addressing these factors and support access to justice.<sup>21</sup> Within the judicial cooperation in civil matters, the EU is developing provisions to address matters *"having cross-border implications"* and *"based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases"*.<sup>22</sup>

<sup>17</sup> See United Nations Development Programme (UNDP) practice note on "Access to Justice".

<sup>18</sup> Kramer, X. (2012). Introduction: Law and Language; Implications for Harmonisation and Cross-Border Litigation. Erasmus L. Rev., 5, 133.

<sup>19</sup> Transnational litigation falls under the domain of private international law, which is "a matter of national law, though it has long been the subject of bilateral and multilateral conventions." Kramer, X. E. (2014, September). European private international law: the way forward. In *depth analysis European Parliament (JURI Committee), in: Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels* (pp. 77-105).

<sup>20</sup> [https://e-justice.europa.eu/content\\_cooperation\\_in\\_civil\\_matters-75-en.do](https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do)

<sup>21</sup> The TFEU clearly states that "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States" (TFEU Article 67, par 1.) and that it "shall facilitate access to justice" (TFEU Article 67, par 4).

<sup>22</sup> Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States" (TFEU Article 81 par 1).



In line with the treaty provisions, the EU legislator tried to address these factors by introducing several legal instruments to simplify, speed up, and reduce costs of litigation. *"In these cross-border cases, European private international law instruments distribute jurisdiction among the Member States' courts and determine the applicable law, contributing to the legal certainty and foreseeability of the outcome of legal disputes for EU citizens".*<sup>23</sup> This is important because, in the absence of harmonized rules, it is up to the national provisions to determine if a national court has jurisdiction and which law applies. As domestic rules differ from Member State to Member State, this would *"create uncertainty as to which court would have jurisdiction if a dispute were to arise, whereas the applicable law would depend upon the choice of law rules of the court that decides the case, making the outcome of a dispute less predictable."*<sup>24</sup>

In this context, *"Judicial cooperation in civil matters aims to establish close cooperation between the authorities of the Member States in order to eliminate any obstacles deriving from incompatibilities between the various legal and administrative systems".*<sup>25</sup>

Over time, several instruments have been introduced in the area of judicial cooperation in civil matters, dealing with specific procedural law issues such as the service of documents and the taking of evidence, harmonizing international jurisdiction, the applicable law, and recognition and enforcement.<sup>26</sup>

In addition to instrument harmonizing specific procedural issue, the EU legislator adopted, in time, three uniform procedures seeking *"to offer alternative procedures that are successful in simplifying, speeding up, and reducing the costs of litigation, as well as securing the free circulation of judicial decisions issued according to these instruments".*<sup>27</sup> These procedures are the European Order for Payment, the European Small Claim, and the European Account Preservation Order. To encourage people to seek a judicial solution and *"make justice more accessible, these procedures*

<sup>23</sup> Kramer, X. E. (2014, September). European private international law: the way forward. In *depth analysis European Parliament (JURI Committee)*, in: *Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels* (pp. 77-105).

<sup>24</sup> Kramer, X. E. (2014, September). European private international law: the way forward. In *depth analysis European Parliament (JURI Committee)*, in: *Workshop on Upcoming Issues of EU Law. Compilation of In-Depth Analyses, European Parliament Brussels* (pp. 77-105).

<sup>25</sup> [https://e-justice.europa.eu/content\\_cooperation\\_in\\_civil\\_matters-75-en.do](https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do)

<sup>26</sup> Onțanu, E. A. (2017). Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures, Intersentia.

Kramer, X. E. (2016). Access to justice and technology: Transforming the face of Cross-border civil litigation and adjudication in the EU. eAccess to Justice; Benyekhlef, K., Bailey, J., Burkell, J., Gélinas, F., Eds, 351-375.

<sup>27</sup> Onțanu, A.E. (2019). Adapting Justice to Technology and Technology to Justice. A Coevolution Process to E-Justice in Cross-Border Litigation. *East European Quarterly*, 8(2), 54-74.



also allow self-representation by the parties”.<sup>28</sup> While, in theory, these procedures are designed to be used without the support of a lawyer, even non-specialized legal practitioners seem to find them challenging to manage in combination with national procedural rules.<sup>29</sup>

Part of the problem emerges from the fact that these instruments result from a compromise between Member States interests and priorities, leaving space for national interpretation in their implementation and practical application. Furthermore, specific aspects of the proceedings are in several cases explicitly delegated to national procedural rules. As a consequence, much complexity still needs to be faced by the user from another Member State when dealing with cross-border cases compared to national ones. Also, national rules that are to be applied in conjunction with the European procedures might become less clear even to national users. Therefore, it should not be surprising that the actual number of cases covered by these supranational procedures is still quite low.<sup>30</sup> As a result, while the relevance of these instruments from a legal perspective has been broadly recognized, they *“have shown severe limits to their capability to respond by themselves to the challenges social and technological developments are posing to the European justice.”*<sup>31</sup> Recent research carried out by the Pro-CODEX project investigated several issues, including:<sup>32</sup>

- Finding practical information on how to carry out the procedure
- Complexity of the procedure for first-time/non-repetitive users
- Differences between procedures (e.g. different structure of the forms, diverging definitions, etc.)
- Determining jurisdiction/competence
- Language barriers
- Unstructured requests/communication needs between the parties and the court not identified in the procedures or supported by forms
- Calculation and payment of (court) fees
- Service of documents

<sup>28</sup> Velicogna 2019 Reconfiguring the European Justice service provision to meet the people needs: an introduction to the e-CODEX solution and e-CODEX Plus experience.

<sup>29</sup> See, for example:

von Hein J. and T. Kruger (eds.) (2021), *Informed Choices in Cross-Border Enforcement*. Cambridge, Intersentia.  
 Onțanu, E. A. (2017). *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures*, Intersentia.

<sup>30</sup> Onțanu, E. A. (2017). *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures*, Intersentia.

<sup>31</sup> Velicogna 2019 Reconfiguring the European Justice service provision to meet the people needs: an introduction to the e-CODEX solution and e-CODEX Plus experience.

See also: von Hein J. and T. Kruger (eds.) (2021). *Informed Choices in Cross-Border Enforcement*. Cambridge, Intersentia.

<sup>32</sup> Velicogna M., Lupo G., Dragoni M., Skripalshchikov A., Behr R., Rieder B., Pangalos G., (2017) Pro-CODEX D1.1 The existing context: Assessment report on the current situation to connect legal practitioners to e-CODEX in Pro-CODEX participating countries, Pro-CODEX project deliverable v.1.0, IRSIG, Bologna.

- Communication exchange with the court (e.g. no feedback, no direct channel of communication)

Other issues identified by the respondents included the lack of uniformity in opposition proceedings; research of relevant case-law; court staff lack of knowledge of ad hoc forms provided by the European regulations and, more in general, lack of knowledge of cross-border judicial procedures by courts; issues related to translation, certified translations and their cost, and lack of harmonization of legal terminology (reminder form, land register terms, corporate terms).<sup>33</sup>

This complexity is also confirmed by many other studies that explored the concrete application of EU cross-border civil procedures.<sup>34</sup> Additionally, the results of a relatively limited number of field researches focusing on quantitative data show that only a limited number of procedures are carried out.<sup>35</sup> These findings are in line with the European Commission evaluations on the use and application of the European Order for Payment and the European Small Claims Procedure.<sup>36</sup>

<sup>33</sup> Velicogna M., Lupo G., Dragoni M., Skripalshchikov A., Behr R., Rieder B., Pangalos G., (2017) Pro-CODEX D1.1 The existing context: Assessment report on the current situation to connect legal practitioners to e-CODEX in Pro-CODEX participating countries, Pro-CODEX project deliverable v.1.0, IRSIG, Bologna.

<sup>34</sup> e.g. Velicogna, M., & Onțanu, E. (2019). Improving Access to Courts and Access to Justice in Cross-border Litigation: Lessons from EU Experiences. *Ciências e Políticas Públicas* (Public Sciences & Policies Journal), (1), 67-93;

Hess, B. (coord.) (2017). *Mutual Trust and Free Circulation of Judgments, An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of Procedural Protection of Consumers under EU Consumer Law. Strand 1, JUST/2014/RCON/PR/CIVI/0082, (Mutual Trust and Free Circulation of Judgments Study)*,

Onțanu, E.A. (2017). *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures*. Intersentia.

Mellone, M. (2014). Legal interoperability in Europe: An assessment of the European payment order and the European small claims procedure. In Contini F. and LanzaraGF (eds) *The Circulation of Agency in E-Justice* (pp. 245-264). Springer, Dordrecht.

<sup>35</sup> See for example: Onțanu, E. A. (2017). *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures*, Intersentia.

<sup>36</sup> Regulation (RTD-L05–2010), prepared by Deloitte for the European Commission, July 2013; European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No 861/2007 of the European Parliament and of the Council; establishing a European Small Claims Procedure (Commission ESCP Report), COM(2013) 795 final, Brussels, 19.11.2013; European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure (Commission EOP Report), COM(2015) 495 final, Brussels, 13.10.2015.

If the situation was not easy before the pandemic, the measures taken in the EU Member States to counter the spread of COVID-19 and affect the functioning of judiciaries, national authorities, legal practitioners, businesses, and the general population have clearly impacted negatively on cross-border judicial litigation.<sup>37</sup> This has been especially true for those measures resulting in 1) partial or total suspension of the work of courts and judicial authorities, 2) temporary inability to obtain legal aid, 3) difficulty to access information usually provided by the competent authorities, 4) delays in the cross border enforcement of decisions or the service of documents, 5) changes in the physical access to courts and means of communication.<sup>38</sup> A further element that has contributed to the difficulty of cross-border litigation during the pandemic has been the heterogeneity of special measures adopted by the EU Member States, as the timeline of the diffusion of the virus has not been the same in the various countries, nor how governments and judiciaries have responded to similar situations.<sup>39</sup>

In the face of these difficulties, preserving effective access to justice and allowing people and businesses to take procedural action in a cross-border case may have become even more critical, as it is even more imperative to ensure trust and the intra-EU export of essential products and services (such as medical and protective products, food) needed to sustain the effort to deal with the pandemic, mitigate the economic impact of COVID-19 and address the socio-economic crisis deriving from it.<sup>40</sup>

### 3. The EU e-Justice experience

Long before the current emergency, in the attempt to overcome the limits of cross-border access to justice in Europe, the EU institutions have explored the possibility to use information and communication technologies. Already in 2007, the JHA Council concluded *“that work should be carried out with a view to developing at European level the use of information and communication technologies in the field of justice, particularly by creating a European portal to facilitate access to justice in cross-border situations”*.<sup>41</sup> Following this political imprimatur, the *“Commission has financed the development, operation and translations of the European e-Justice Portal and provided funding opportunities for e-Justice projects through a number of means, including DG Justice, the Connecting Europe Facility, the Interoperability Solutions for European public administrations, and the*

<sup>37</sup> Chiapponi, G. (2020) Judicial cooperation and coronavirus: the law must go on. Available at <http://www.judicium.it/judicial-cooperation-and-coronavirus-the-law-must-go/>

<sup>38</sup> [https://e-justice.europa.eu/content\\_impact\\_of\\_the\\_covid19\\_virus\\_on\\_the\\_justice\\_field-37147-en.do](https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do)

<sup>39</sup> Bart, K., & Nylund, A. (2020). An Introduction to Covid-19 and Civil Justice. Septentrio Reports, (5), 4-5.

<sup>40</sup> See for example [https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf)

<sup>41</sup> Draft strategy on European e-Justice 2014-2018, OJ C 376, 21.12.2013, p. 7–11

*Competitiveness and Innovation Framework programs.*"<sup>42</sup> In 2010 the EU e-Justice Portal, hosted and operated by the European Commission in line with the indications provided by the Council,<sup>43</sup> was introduced to the public, to *"make life easier for citizens, businesses and practitioners in Europe"*.<sup>44</sup> It was intended as means to improve access to justice and its delivery through information provision on EU and National legal procedures, a *"one-stop cyber shop for justice information"*<sup>45</sup> for EU citizens, businesses, and lawyers. More than just information, it was intended especially to be a means to quickly provide citizens legal information and advice.<sup>46</sup>

The Portal is designed to provide information in both criminal and civil proceedings, ranging from victims' and citizens' rights to guidelines to initiate different kinds of civil proceeding in another Member State. The information contained by the Portal is provided by the national competent authorities and translated, in time, in the other EU official languages through machine and human translation. The e-Justice Portal is also increasingly offering access *"to tools, such as the EU legislation database, the Eur-lex, the search for a legal professional which may be needed to access justice services; the 'ECLI' search engine, designed to facilitates access to jurisprudence in the EU cross-border context by allowing EU citizens and legal practitioners to easily locate case law featuring a European Case Law Identifier."*<sup>47</sup>

The Portal also offers online multilingual dynamic forms used in the cross-border judicial procedures, such as the European Order for Payment. Such forms can be filled online, saved in XML format and, once completed, printed and sent to the competent court. To guide the potential users through the EU procedures, user guides have been made available and are being constantly improved, providing help to the more or less expert users in selecting the right legal instrument and identify the actions that need to be carried out. Unfortunately, these guides seem to fail to convey the practical knowledge needed to deal with concrete cases as the level of harmonization of EU procedures is often quite low for critical steps of the procedures, and the national implementations

<sup>42</sup> Velicogna, M. (2018) e-Justice in Europe: From National Experiences to EU Cross-Border Service Provision. In L. Alcaide Muñoz and M.P.R. Bolívar (eds.) "International e-Government Development. Policy, Implementation and Best Practices", Palgrave Macmillan. pp. 39-72.

<sup>43</sup> Draft Strategy on European e-Justice 2014-2018 (2013/C 376/06)

<sup>44</sup> [http://europa.eu/rapid/press-release\\_IP-10-956\\_en.htm](http://europa.eu/rapid/press-release_IP-10-956_en.htm) Accessed on 10/10/2016

<sup>45</sup> *Ibidem*.

<sup>46</sup> *Ibidem*.

<sup>47</sup> Velicogna, M. (2018) e-Justice in Europe: From National Experiences to EU Cross-Border Service Provision. In L. Alcaide Muñoz and M.P.R. Bolívar (eds.) "International e-Government Development. Policy, Implementation and Best Practices", Palgrave Macmillan. pp. 39-72.

are characterized by *"divergent practices and interpretations"*.<sup>48</sup> A wizard has also *"been introduced to support the selection of one of the cross-border civil procedures answering a tree of questions, but its usefulness has been also questioned (Velicogna and Lupo 2016)"*.<sup>49</sup>

Furthermore, although it is not required to access the services mentioned above, users can register and login to the Portal through the European Commission Authentication Service (ECAS). This functionality will be needed for future services, such as the ones supporting the actual filing of EU procedures. Additional functionalities are also provided in cooperation with third parties and additional tools are being connected. As an example, a function for 'finding a competent court' is available to help users to identify the competent court for a specific case. Unfortunately, the tool does not help understanding if a court is actually competent for a given case but identifies a number of courts that have jurisdiction for a given area. In addition, the function provides useful contact details for the courts such as the telephone numbers, address, and other contact information.<sup>50</sup> Another functionality is a search engine called Find-A-Lawyer,<sup>51</sup> which can help *"users to find lawyers on the base of different criteria such as country, practice area or language"*.<sup>52</sup>

All the efforts described in the previous paragraphs aim to provide online support for parties to be able to access justice services. In the last ten years, a further step has been made to support access to justice in the new social and economic environment attempting to provide online procedures. This initiative was started by a consortium of EU Ministries of Justice and representative of justice European professional bodies (e.g. CCBE for lawyers, CNUE for notaries) within a project co-funded by the EU. The project, called e-CODEX, began in December 2010 and ended in May 2016. The project developed a technical solution allowing reliable, fast, and secure transportation of data between existing national e-justice solutions within the existing legal framework. Essential requirements for the system were to respect the principles of subsidiarity and the independence of the judiciaries.<sup>53</sup> Furthermore, the *"solution is content agnostic, in the sense that the transport of data is independent from the format of the files being exchanged and from the business processes being*

<sup>48</sup> Onțanu, E. A. (2017). Incorporating European Uniform Procedures into National Procedural Systems and Practice: Best Practices a Solution for Harmonious Application. In *From common rules to best practices in European Civil Procedure* (pp. 459-480). Nomos Verlagsgesellschaft mbH & Co. KG. p.461.

<sup>49</sup> Velicogna, M. (2018) e-Justice in Europe: From National Experiences to EU Cross-Border Service Provision. In L. Alcaide Muñoz and M.P.R. Bolívar (eds.) *"International e-Government Development. Policy, Implementation and Best Practices"*, Palgrave Macmillan. pp. 39-72.

<sup>50</sup> [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/cc\\_searchmunicipality\\_en.jsp#statePage0](http://ec.europa.eu/justice_home/judicialatlascivil/html/cc_searchmunicipality_en.jsp#statePage0) Accessed on 07/10/2016

<sup>51</sup> [https://e-justice.europa.eu/content\\_find\\_a\\_lawyer-334-en.do](https://e-justice.europa.eu/content_find_a_lawyer-334-en.do) Accessed on 10/10/2016

<sup>52</sup> Velicogna, M. (2018) e-Justice in Europe: From National Experiences to EU Cross-Border Service Provision. In L. Alcaide Muñoz and M.P.R. Bolívar (eds.) *"International e-Government Development. Policy, Implementation and Best Practices"*, Palgrave Macmillan. pp. 39-72.

<sup>53</sup> Velicogna, M. (2019) Reconfiguring the European Justice service provision to meet the people needs: an introduction to the e-CODEX solution and e-CODEX Plus experience.

supported".<sup>54</sup> The system "is designed as a decentralized system based on a distributed architecture, enabling communication between national and European ICT systems through a network of [National] access points".<sup>55</sup> From a technical perspective, the "infrastructure consists of a connector and a gateway. The installation of the gateway ensures a secured connection with a gateway in another Member State. The connector carries out the adaptations required for receiving encrypted data by the corresponding service provider in another Member State."<sup>56</sup> Each Member State "needs to install its own instance of the e-CODEX components nationally. Therefore the operation of the running system has to be done by the e-CODEX participants itself."<sup>57</sup>

To ensure the legal effectiveness of electronic communications, the infrastructure provides a tool for the validation and cross-border recognition of national e-identities and e-signatures.<sup>58</sup> Using existing national "systems for the authentication of users adds reliability to electronic legal proceedings and helps avoid malicious use of e-Justice services."<sup>59</sup>

After being developed, the system was tested by piloting countries in five cross-border judicial procedures (see Table 1), demonstrating that the system was not only technically functioning, but also capable of supporting real cases, involving real people, real judges, and real judicial decisions.

After the project ended, the generic components of the transportation infrastructure were handed over to the Connecting Europe Facility (CEF), while follow-up projects have continued to be financed: 1) to maintain the domain-specific components (i.e. Me-CODEX, Me-CODEX2); 2) to extend the system to additional procedures and Member States (i.e. EXEC, IRI, e-CODEX Plus, CEF e-Justice DSI) and; 3) to open it to legal professions and third-party service providers (i.e. Pro-CODEX, API for Justice).<sup>60</sup> The decision to use e-CODEX as the transport infrastructure for the EU e-Evidence Digital Exchange System that is being created "to secure and obtain e-evidence more quickly and effectively

<sup>54</sup> Steigenga, E., & Velicogna, M. (2017). Envisioning the next step in e-Justice: in search of the key to provide easy access to cross-border justice for all users. In *From common rules to best practices in European Civil Procedure* (pp. 243-270). Nomos Verlagsgesellschaft mbH & Co. KG. p.197

<sup>55</sup> Amato, R., Velicogna, M. (2020). Encoding cross-border Judicial cooperation in criminal matters: current practices and the rise of the eu e-Justice infrastructure, in C. Billet, A. Turmo, *Coopération opérationnelle en droit pénal de l' Union européenne*, 1re édition 2020, pp. 189-218.

<sup>56</sup> <https://www.e-codex.eu/technical-solutions>

<sup>57</sup> <https://www.e-codex.eu/faq-e-codex>

<sup>58</sup> Velicogna, M. (2014). Coming to Terms with Complexity Overload in Transborder e-Justice: The e-CODEX Platform. In *The circulation of agency in E-Justice* (pp. 309-330). Springer, Dordrecht.

<sup>59</sup> <https://www.e-codex.eu/technical-solutions>

<sup>60</sup> *Ibid.*



by streamlining the use of MLA proceedings and where applicable, mutual recognition" is of particular relevance.<sup>61</sup>

Table 1: e-CODEX Piloting (based on Velicogna 2019, data source: Hvillum, et al. 2016)

Cross-border judicial procedure	Go live date	Countries piloting live in May 2016	Countries in the testing phase in May 2016
European Order for Payment	August 2013	Austria, Estonia, Germany, Greece, Italy, Malta, Poland	France
Europeana Small Claim Procedure	June 2015	Austria, Czech Republic, Malta, Poland	France
Business Registers	September 2015	Austria, Ireland, and Italy	
Mutual Legal Assistance	November 2015	Germany, Spain, Netherland	Greece
Financial Payments	May 2016	France and Netherland	Germany, Hungary

The e-CODEX community is also working on the handover of e-CODEX justice domain generic component and services to an EU agency for long-term maintenance and evolution. While until recently the European Commission and Council of the European Union were only informally "aligned on the selection of the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)"<sup>62</sup> for this role, on October 13, 2020 *"the Council has invited the Commission to present a legislative proposal ensuring the sustainability of e-CODEX"*,<sup>63</sup> explicitly mentioning eu-LISA and the need to establish an adequate governance and management structure *"that respects the independence of the judiciary and the constitutional requirements of the Member States"*.<sup>64</sup> Following this input, on December 2, 2020, the Commission presented a proposal for a *"Regulation of the European Parliament and of the Council on a*

<sup>61</sup> JHA Council of the European Union, Council conclusions on improving criminal justice in cyberspace, Luxembourg, 9/6/2016, p. 4

<sup>62</sup> Amato, R., Velicogna, M. (2020). Encoding cross-border Judicial cooperation in criminal matters: current practices and the rise of the eu e-Justice infrastructure, in C. Billet, A. Turmo, *Coopération opérationnelle en droit pénal de l' Union européenne*, 1re édition 2020, pp. 189-218.

<sup>63</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 COM/2020/712 final p.3

<sup>64</sup> Council Conclusions 'Access to justice – seizing the opportunities of digitalisation' (ST\_11599\_2020\_INIT\_en p. 9).



*computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726".<sup>65</sup>*

At the same time, the e-CODEX experience has not provided just a technical solution, but also the opportunity to better investigate the failing points of existing legal procedures from a practical and user-centric perspective. In particular, e-CODEX piloting with real cases revealed the complexity of the continuous interplay between uniform European judicial procedures and national laws, which govern specific aspects of their implementation.<sup>66</sup> More, it showed the complexity for the user in dealing with the resulting, very diversified, national procedures and local practices, which requires local knowledge not centrally available.<sup>67</sup>

In conclusion, while much has been done, a key issue remains: the number of cross-border civil justice cases, including EOP, EAPO, and ESCP proceedings, is still minimal. In several instances, this may be related to the emergence of alternative means to assert individual rights in cross-border transactions. The diffusion and increasing regulation of alternative dispute resolution (ADR) and Online Dispute Resolution (ODR) mechanisms are examples of this trend. The European Commission has even set up a platform to support the solution of disputes between consumers and online traders and allow electronic access to recognized ADR entities.<sup>68</sup> The private enterprises providing online services are also increasingly developing mechanisms to resolve disputes and support online dispute resolution and integrating such mechanisms in their platforms.<sup>69</sup> eBay system to resolve disputes between buyers and sellers is but one example of this trend.<sup>70</sup> It has been argued that ODR is "*a natural evolution of the trend towards using alternative approaches to litigation across a wide range of civil, commercial, and family disputes*"<sup>71</sup>, reducing transaction costs and the complexity faced by

<sup>65</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020PC0712>

<sup>66</sup> See for example: Pangalos, G., Salmatzidis, I., & Pagkalos, I. (2014). Using IT To Provide Easier Access To Cross-Border Legal Procedures For Citizens And Legal Professionals-Implementation Of A European Payment Order E-CODEX Pilot. *International Journal*, 43.

Velicogna, M. (2015). e-CODEX and the Italian Piloting Experience. IRSIG-CNR Working Paper, Bologna, Italy.

<sup>67</sup> Velicogna 2019 "Reconfiguring the European Justice service provision to meet the people needs: an introduction to the e-CODEX solution and e-CODEX Plus experience"

<sup>68</sup> <https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks>

<sup>69</sup> For a broader discussion on the topic see: Velicogna, M. (2020). Cross-border dispute resolution in Europe: looking for a new 'normal'. Paper prepared for: Technologies of normalization: A seminar exploring the normal, the normative and the techniques maintaining them. 29 September to 13 October 2020.

<sup>70</sup> Rule, C. (2016). Designing a Global Online Dispute Resolution System: Lessons Learned from eBay. *U. St. Thomas LJ*, 13, 354.

<sup>71</sup> Ebner, N., & Zeleznikow, J. (2015). Fairness, trust and security in online dispute resolution. *Hamline J. Pub. L. & Pol'y*, 36, vi, p.144.

the parties in a setting where *"trials are getting longer and more complex, and the cost of pursuing traditional legal recourse is rising"*.<sup>72</sup>

#### 4. The e-Justice national experiences during the COVID emergency

European Judiciaries have resorted to a wide range of ICT solutions to limit the impact of measures taken in the EU Member States to counter the spread of COVID-19 and continue to provide justice services. While the initiatives undertaken have varied broadly depending on the level of ICT development, governance, and regulatory requirements of the various Member States, some trends can be identified. Furthermore, while intended as temporary measures, the effects of these initiatives will linger after the end of the emergency, as they allowed to test, both with positive and negative results, alternative solutions to the traditional way of carrying out business which was no longer viable outside of limited exceptions for urgent cases, and in some situations, not even for them. In particular, ICT has been used in several key areas to help manage the emergency, including information to the court users, remote working of judges and of administrative personnel, electronic exchange of documents and notifications related to the proceedings, and finally, remote hearings.

While providing electronic information to court users is now a long-standing tradition in most judiciaries,<sup>73</sup> the emergency measures consistently increased the relevance of court websites, contact forms, and e-mails to improve the communication between courts and their constituents. In Croatia, for example, the Ministry of justice issued on the 13<sup>th</sup> of March 2020 recommendation for all judicial authorities in the Republic of Croatia during the epidemic stating that *"communication in dealing with parties and all participants in proceedings is done electronically in all cases where that is possible"*.<sup>74</sup> Furthermore, in several countries, solutions were rapidly set up to allow parties to access online information on their cases' status. Once again, while this kind of tools was already available in several countries (in Italy, for example, it was already possible to consult the courts' civil procedure anonymous records through the Portal of Telematic Services or through the "Civil Justice" App available for Android, IOS and Windows Phone<sup>75</sup>), the pandemic pushed to higher reliance on such tools where they were available and to the rapid deployment of ad-hoc solutions in other cases (as in the Dutch case described below).

In general, courthouses are not structured to guarantee interpersonal distance and avoid gatherings. Measures taken affected the physical access and working practices. For the analytical purposes of this paper these measures concerned actors that can be grouped, in two categories:

<sup>72</sup> Ebner, N., & Zeleznikow, J. (2015). Fairness, trust and security in online dispute resolution. *Hamline J. Pub. L. & Pol'y*, 36, vi, p.144.

<sup>73</sup> See for example: CEPEJ-CoE (2012) CEPEJ report evaluating European judicial systems - 2012 edition (2010 data) - CEPEJ Studies No. 18, Council of Europe, p.111;

Velicogna, M., & Ng, G. Y. (2006). Legitimacy and Internet in the Judiciary: A lesson from the Italian Courts' websites experience. *International Journal of law and information technology*, 14(3), 370-389.

<sup>74</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Croatia>

<sup>75</sup> [http://pst.giustizia.it/PST/it/pst\\_2\\_6.wp](http://pst.giustizia.it/PST/it/pst_2_6.wp)

'internal' court facilities users (judges and administrative personnel) and 'external' court facilities users (lawyers, parties, witnesses, public, etc.).

While judges and administrative staff are both 'internal' court facility users, the organization of their work and their working practices tend to differ consistently. In recent times, managerial pressure has driven judges toward increased coordination of their activities with those of the other judges and administrative personnel. At the same time, they still usually carry out several of their tasks (such as the study of cases and drafting of decisions) independently. Therefore, it is not a case that their working practices often included forms of remote working even before the COVID-19 emergency. In the off-line practice, judges are typically allowed to bring their paper case files at home to 'work' on them, and ICT applications have been developed to support such activities (these solutions are typically based on a broader electronic communication and case files database infrastructure which will be discussed when considering the external users). The 'Judge Console' in the Italian Civil Trial On-line, for example, supports such functionalities. In general, therefore, it has been relatively simple to keep carrying out (or extend the carrying out) of these autonomous activities in a remote manner.

Many countries extended the possibility to use electronic means to support this, often modifying existing procedural rules and practices. In Norway, for example, *"the legislation has been temporarily changed to allow decisions to be made without physical signatures from all judges. Only the presiding judge has to sign, and the signature may be scanned and sent to the court for registration electronically along with a confirmation from the presiding judge that the other judges have accepted the final wording of the decision"*.<sup>76</sup>

At the same time, the administrative component of the court activities, such as the management of the court registers, has been traditionally carried out within the court, and even when electronic case management systems have been developed, they have typically been structured to allow access on site. Once again, the Italian Civil Trial online provides an example of it, as it was built around the idea that all activities had to be carried out by the administrative personnel within the court. To overcome the problems this configuration generated during the lockdown, VPNs have been set up to allow carrying out administrative activities from remote. At the same time the development of a more permanent 'official' solution was started. This generated a dis-homogeneous adoption, which relied on local initiative. At the same time, the Head of the Department of the Judicial Organization, Personnel and Services of the Italian Ministry of Justice stated that as of June 12, 2020, remote access to 'administrative' applications was enabled for about 9000 units of personnel.<sup>77</sup>

<sup>76</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Norway>

<sup>77</sup> Circolare 12 giugno 2020 - seguito a direttive in tema di organizzative per gestione cd. "fase due" nel contesto epidemiologico da COVID-19: indicazioni a supporto di una maggiore ripresa delle attività nei mesi di giugno e luglio - ORGANIZZAZIONE GIUDIZIARIA, prot - m\_dg.DOG. 12/06/2020.0094300.U

Therefore, this change in the consolidated court practices has brought about a much more radical change than the one of remotization of Judges' autonomous tasks.

The lockdown of courts also required finding alternative means for 'external' court facilities' users to carry out their activities. In Finland, for example, physical presence at the courthouses was "*limited to parties of urgent cases*".<sup>78</sup> This resulted in the need to authorize electronic communication between the court and external court users to support the documents' exchange. While mail communication means could still be used, this implied delays and the problem for judges and administrative personnel to deal with paper documents while working remotely. Some countries such as Austria and Portugal had an electronic communication infrastructure broadly deployed and in use. Other countries were still in the process of deploying some of their components. Italy, for example, was relying on a fully digital exchange infrastructure in the civil justice area for the court of First and Second Instance. In this context, the COVID-19 emergency led to a speedy rollout of the Civil Trial On-line also at the Court of Cassation, to the mandatory filing of introductory documents at all instances, and to the compulsory electronic payment of court's fees for the documents deposited. In the criminal justice area, which was lagging behind, the COVID-19 emergency sped up the deployment of the e-justice system, including the extension of the electronic notifications to the criminal trial and the possibility for the defense to electronic deposit memories, documents, and requests (referred to in art. 415 bis cpp) with legal value.<sup>79</sup>

Other countries had to improvise more. In the Netherlands, for example, where an electronic communication infrastructure was not available after the failure of the KEI system development in 2018,<sup>80</sup> an emergency solution was rapidly set up, and from the 9th of April 2020 it has been possible to "*use of the so-called 'Safe Mailing' service of the Judiciary. In this way, (procedural) documents and messages can be exchanged by e-mail*".<sup>81</sup> This solution, though, also generated some complexity, as

<sup>78</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Finland>

<sup>79</sup> Circolare 2 maggio 2020 - prevenzione della diffusione del contagio da coronavirus - informazioni riassuntive su attività svolte e prime direttive in tema di organizzative per avvio cd. "fase due" - ORGANIZZAZIONE GIUDIZIARIA, prot - m\_dg.DOG. 02/05/2020.0070897.U

<sup>80</sup> See: Schmidt, A. H., & Zhang, K. (2019). Agent-Based Modelling: A New Tool for Legal Requirements Engineering: Introduction and Use Case (KEI). *European Quarterly of Political Attitudes and Mentalities*, 8(1), 1-21;

Kramer, Xandra E. and van Gelder, Emma and Themeli, Erlis, e-Justice in the Netherlands: the Rocky Road to Digitised Justice (May 15, 2018). in: M. Weller & M. Wendland (eds.), Digital Single Market: Bausteine eines Rechts in der Digitalen Welt, Tübingen: Mohr Siebeck 2018, p. 209-235. Available at SSRN: <https://ssrn.com/abstract=3167543> or <http://dx.doi.org/10.2139/ssrn.3167543>

<sup>81</sup> Tjon-En-Fa E., Scheffer L. (2020) COVID-19: Consequences for dispute resolution in the Netherlands, available at <https://www.twobirds.com/en/news/articles/2020/netherlands/covid-19-consequences-for-dispute-resolution-in-the-netherlands>

e-mail filing *"makes it hard to keep track of which documents have been filed and what the current status is"*.<sup>82</sup>

Even more critical than for the exchange of documents, the ICT innovation has concerned the management of court hearings. In general, courts lockdown resulted in the postponement of hearings, except in urgent cases. For example, from *"13 March, the Norwegian courts were basically closed for oral main hearings, which are cornerstones in the legal system. Only urgent hearings, such as custody hearings were held."*<sup>83</sup> Also in Greece, *"all courts' hearing procedures were temporary suspended, until the 10th of April - with some exceptions"*.<sup>84</sup>

At the same time, most countries investigated *"the possibilities for organizing trial sessions without the presence of the parties at the courthouse"*<sup>85</sup> and introduced means to carry out urgent hearings avoiding physical attendance whenever possible. In the Netherlands, the general regulation on case-handling by the Judiciary during the COVID-19 period<sup>86</sup> provided that *"In principle oral hearings with the physical attendance of the parties will not take place during the COVID-19 period, unless the judge decides otherwise. Both serious and other urgent cases will take place as much as possible in writing or through telephone (video) connection"*.<sup>87</sup>

The emergency raised the attention in several countries not only to the limitations of implemented technologies, but also on the ones of the existing legal frameworks regulating their use. In Norway, for example, rules and technical solutions had been designed to allow only one party and or its legal counsel *"to attend remotely, while the judge or panel of judges, the other party and the legal counsel of one or both parties would be present in the courtroom. They did not foresee the judge sitting at home, and the parties and their legal counsel being present in their own homes or offices, i.e. perhaps five different locations instead of just two locations"*.<sup>88</sup>

The approach adopted by the different judiciaries varied depending not only on the basis of the technical possibilities but also of the legal framework and litigation practices (e.g. prevalence of oral versus written, pragmatism versus formalistic etc.). In Italy the emergency laws provided for two new ways of holding civil hearings, one documental, the other remote through videoconference. For

<sup>82</sup> <https://www.rechtspraak.nl/English/NCC/news/Pages/The-Netherlands-Commercial-Court-and-COVID19-case-management-videoconference-hearings-and-eNCC.aspx>

<sup>83</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Norway>

<sup>84</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Greece>

<sup>85</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Finland>

<sup>86</sup> [https://www.rechtspraak.nl/coronavirus-\(COVID-19\)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx](https://www.rechtspraak.nl/coronavirus-(COVID-19)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx)

<sup>87</sup> Van Gelder, E., Kramer, X., and Themeli, E. (2020) Access to justice in times of corona, in conflictolaws.org

<sup>88</sup> Nylund A. (2020) Civil Procedure in Norway and Covid-19: Some Observations. Septentrio Reports, (5), 39-42, p.40

urgent and not delayable cases, *"the hearing can take place via remote connection, provided that the attendance of only the attorneys for the parties is required (meaning that the personal attendance of the parties is dispensed with). In any other case (and always provided that the attendance only of the attorneys for the parties is required), the hearing [... is] replaced by an online exchange of written briefs whose contents [... is] limited to the petitions and conclusions of law advanced by the parties"*.<sup>89</sup> In case of remote hearings, *"videoconference must take place through the applications made available by the Ministry of Justice: Microsoft Teams and Skype for Business (decree of the Director General S.I.A. of 20 March 2020)"*.<sup>90</sup> The connections made with the two programs on office or personal devices use infrastructures of the Ministry of Justice or data center areas reserved exclusively to it.<sup>91</sup> Interestingly enough, the judge is charged *"to inform the parties in advance of 'day, time and mode of connection'."*<sup>92</sup> Other countries followed a much less regulative approach. In England and Wales, for example, a bottom-up approach seems to have taken place, with judges starting to experiment the possibilities allowed by the various systems, leading only after to the issuing of protocols, while still by the end of March 2020 *"[t]here is currently no 'single' technology to be used by the judiciary. The court and parties must choose from a selection of possible IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom etc.)"*.<sup>93</sup> Nevertheless, also in England and Wales, the need to adapt the existing legal framework to the new context emerged, to allow, for example, the public 'to see and hear' court proceedings conducted wholly as video, as under pre-Coronavirus Act 2020 regulations, the live-stream of a proceeding would have been a criminal offense.<sup>94</sup>

While taken individually, all these ICT initiatives may appear as incremental steps on the existing path of development, taken together they represent proof that a radical reconfiguration of the way the justice service provision is organized and provided is possible. As an example, during the emergency, the geographical competence of the courts has persisted. At the same time, remote working, electronic communication and exchange of documents, remote consultation of case files, and remote hearings where no participant physically entered the court, have shown in practice that this is not required anymore. Of course, many issues emerged and will need to be addressed. Emergency legislations and technical solutions have been implemented hastily and to respond to immediate needs. As the urgency and the state of exception generated by the pandemic will fade, increasing attention will be given to the justice values that have been compressed to allow justice systems to function.<sup>95</sup>

<sup>89</sup> Silvestri, E. (2020) Extraordinary Measures Concerning Civil Justice Adopted by the Italian Government in Connection with the Emergency Caused by Coronavirus. *Septentrio Reports*, (5), 32-33, p.33

<sup>90</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Italy>

<sup>91</sup> Decree of the Director General S.I.A. of 20 March 2020

<sup>92</sup> <https://www.coe.int/en/web/cepej/compilation-comments#Italy>

<sup>93</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/20200331-Court-of-Protection-Remote-Hearings.pdf>

<sup>94</sup> Sorabji, J. (2020). English and Welsh Courts in the Age of Covid-19. *Septentrio Reports*, (5), 16-19.

<sup>95</sup> See for example: Krans, B., & Nylund, A. (2020). Concluding Remarks on Covid-19 and Civil Justice. *Septentrio Reports*, (5), 54-57.



Nevertheless, the practical experiences and the demonstration that things can be done differently will remain. When this will be coupled with the growing deployment of the e-CODEX platform as an interoperability layer between national e-Justice infrastructure, it will open up a new space of possibilities to provide cross-border justice. Once again, it should be noted that most of the innovative experiences carried out so far refer to National contexts. While published literature does not provide data on this topic yet, informal interviews carried out with legal practitioners in the first quarter of 2021 seems to show that the spillover of new practices from the national domain to the cross-border one, such as the case of cross-border participation to remote videoconference hearings, is still the exception.

## 5. Concluding remarks

The emergent topography of the digital world superimposes on the physical topography changing the social and economic ecosystem of the EU, increasingly decoupling economic and social life from local physical spaces. As a result, national laws become less and less equipped to regulate the practices of everyday life. The EU institutions have attempted to cope with this through legal instruments supporting judicial cooperation and cross-border proceedings. The effort to reduce the boundedness of legal remedy to the national territory and ensure access to justice in the new cross-border spaces of everyday life has not produced the expected results. The many issues affecting cross-border legal action described in the paper still affect even the EU uniform procedures, which often remain too complex and costly for the general public. The attempt to improve the situation through the use of ICT has resulted in the creation of a repository of information in the e-Justice Portal, which requires time and expertise to navigate in the hope of achieving the needed knowledge to take action. The development and piloting of e-CODEX, a platform to carry out cross-border judicial communication, has resulted in the possibility of online cross-border filing of cases and interoperability of national e-justice solutions. Unfortunately, access to justice through these means is still limited. The still high complexity of cross-border procedures and the growing presence of alternative online dispute resolution mechanisms may at least partially explain the present situation. The pandemic and the emergency measures introduced at the national level have further added to this complexity, introducing new practices and reducing the certainty, as a result of the different timelines of COVID-19 spreading and diversified national responses.

At the same time, experimentation at the national level with new uses of available ICT solutions resulting from the need to face the COVID-19 emergency has had a consistent impact on the court's organization of work. The space of action generated by the impossibility of working with well-established practices has allowed exploring new possibilities provided by existing technologies. The re-combination and repurposing of technologies developed for the justice domain (such as case



management systems and e-justice platforms) and more generic technologies which had previously seen only limited and informal use in court proceedings (such as Skype, Microsoft Teams, Zoom) allowed a reconfiguration of justice service provision in ways that conflict with pre-existing rules and practices but that are, at the same time, much more aligned to the needs of contemporary European social life.

How much of these experiences will be maintained after the emergency remains to be seen. At the same time, the live testing carried out in an incredible number of scenarios will provide the opportunity to discuss the new possibilities considering them in light of their concrete implementation and the experienced impact on core justice values.

From this perspective, further attention should be given to the next developments in the area of the cross-border (e-)justice domain and on the possibility to transform the current crisis into an opportunity, enabling EU Justice to keep up with the growing challenges driven by the social and economic evolution of EU ecosystem.

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